

Dealing with a Rogue UK Prime Minister

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Introduction

In the current “Brexit” crisis, the EU should strive to achieve a smooth agreement-based process. This is the only way to ensure that the intricate web binding the UK to the EU is not ripped up without a reliable substitute. Boris Johnson’s priority to withdraw the UK on 31 October “do or die” is next to impossible to reconcile with that aim: it is unlikely that the UK Parliament were to accept Theresa May’s deal which it rejected thrice. So far, the Prime Minister has conjured some principles, which might grow into a draft withdrawal agreement before the next European Council summit on 16-17 October. Even if this were agreed, only 14 days remain until 31 October for the European Parliament to approve, and the two Houses of Parliament in Westminster to endorse its ratification. Under [Article 13 of the EU Withdrawal Act 2018](#), as amended by the “Benn Act” (below), without ratification an unmanaged “Brexit” [would ensue](#).

Domestically, it will be difficult to halt Johnson’s no-deal plan, as I will show in more detail below. But what about the EU? Indeed, there are several measures the EU could take to deal with a rogue UK Prime Minister and to make a smooth withdrawal more likely.

Preventing “no deal” within the UK: The “Benn Act” as a barrier?

The so-called “[Benn Act](#)”, crafted as a barrier against a “no-deal Brexit”, requires specified action by the Prime Minister, if there is no a withdrawal agreement by 19 October, or, alternatively, Parliament has accepted a motion that the UK withdraws from the EU in a disorderly fashion on 31 October. If neither happens, the PM must send a letter to the European Council requesting an extension of the negotiation period under Article 50 TEU until end of January 2020. If the European Council grants the request, the Prime Minister is also required to accept this, even with a different end date. Should the Prime Minister send a second letter asking for the first one not to be taken seriously, this would still violate the legislation, which requires the PM to seriously seek an extension. Some speculate that the government [will ask the Privy Council to postpone the Act’s implementation until after 31 October](#), possibly relying on the [Civil Contingency Act 2004](#). The CCA allows a government to refrain from enacting legislation in a national emergency. The government plans to rely on the argument that riots will ensue if the UK is not withdrawn from the EU by 31 October. [However](#), the CCA’s definition of an emergency can hardly be stretched to include hostile public opinion whipped up by governments or their advisors.

The government does not need to use such dubious measures in order to thwart the “Benn Act”. After all, the Act says nothing about a conditional acceptance of the extension by the EU, as has been [proposed by the European Parliament \(EP\) last week](#). So, if the acceptance by the EU comes with conditions attached, formally, the prime minister may still reject it without parliamentary consent. Finally, section 3 (3) of the “Benn Act” allows for the government to put a motion before Parliament, asking whether the extension should be accepted, instead of using its prerogative to just accept it. If Parliament rejects the extension, the government may reject it as well. Seeking a specific decision by Parliament should also be the adequate route to deal with any conditions for the extension.

The Prime Minister might seek a further prorogation of parliament in spite of the Supreme Court ruling of 24 September. But there is also a procrastination strategy available which remains safely within the law. First, he can prevent the EU Council on 14-16 October from even discussing a changed withdrawal agreement by refusing to provide any document detailing changes which the European Council could forward to the 28 Member States’ governments for inspection at least two weeks before the meeting. Second, he could then table the 2018 draft withdrawal agreement in the House of Commons. If it fails a fourth time, he can deal with the ensuing obligation under the Benn-Act as indicated above. Even if the House passes the withdrawal agreement, the timing to pass legislation to ratify it, as previously discussed, is very short. Some administrative manoeuvring would easily achieve no-deal Brexit.

Any parliamentary vote capable of preventing no deal Brexit is likely to take place just a few days before 31 October. The weeks in the runup to that vote there is time to intensify the hostile rhetoric peddled by the current government. Any MP voting for an extension may be branded a traitor, and the Prime Minister himself may continue to explain that MP’s only protection against violence consists of them voting with the government. If these techniques are paired with threats from outside government and parliament, the MPs’ resolve to prevent no-deal “Brexit” may waver.

Gaining the upper hand for the EU?

What, if anything, can the EU do to avoid a no-deal Brexit under these circumstances? The inflammatory rhetoric and the explicit intention to dodge their legal obligations resemble debates in other Member States where democracy is threatened by right wing populism. Dealing with a rogue UK Prime Minister thus offers another opportunity to the EU to demonstrate that its defence of its values is robust.

In the first instance, the EU could take hold of the reins through the European Council initiating an extension of the withdrawal period, rather than waiting for an application by the UK , in line with the wording of Article 50 paragraph 2:

“The Treaties shall cease to apply to the (withdrawing state) from the date of entry into force of the withdrawal agreement or, failing that, two years

after the notification (...) unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

If the European Council were to be proactive, it could also phrase its conditions more clearly and tie the extension to holding either a general election or a renewed referendum which is untainted by fraudulent campaigning strategies. This would support those UK MPs who are reluctant to agree to any action other than requiring Boris Johnson to resign, because this would lead to an unmanaged withdrawal. It would also support democratic processes, as it is virtually impossible to organise an election before 31 October 2019.

If the European Council were to propose the extension, this would relieve Boris Johnson from the task to deliver a prefabricated letter. It would be difficult for the UK government to reject such a proposal, if it has not provided sufficiently sincere, and elaborated proposals for changing the draft withdrawal agreement. This might even seem to be in contrast if not with the letter, then the spirit of the “Benn Act”. If the UK Parliament is not prorogued again, it will probably adopt at least a motion, if not legislation to endorse the extension.

There is a downside from the EU perspective: the UK would continue to participate in the EU political processes. For this reason, the last extension was set for the 31 October, the last day of office of the present EU Commission. As an EU Member State, the UK has ample opportunities to thwart EU governance, for example by refusing to accept the budget for 2020. Earlier this month, Johnson had threatened to make the EU's operation illegal, for example by refusing to nominate a Commissioner. However, this move would only constitute a breach of EU duties by the UK, which could be addressed by the usual EU procedures, i.e. [litigation before the ECJ](#).

Once the negotiation period is extended, the EU might also wish to propose on its own account changes to the draft withdrawal agreement, in particular its Protocol on Ireland/Northern Ireland. The original sketch was based on the assumption that Northern Ireland would be in a common regulatory area with the EU, and also contained a draft provision which would have allowed to extend this common regulatory area to encompass the full Internal Market. The intervention by the UK resulted in a construction according to which the UK remains in a customs union with the EU, hindering its aspirations to conclude free trade agreements all over the world. This is however problematic for the EU as well. The EU Commission could utilise the break produced by the UK government's inaction re negotiation in order to fully paraphrase its original proposal, thus potentially closing in on agreement.

Rule-of-law proceedings against the still-Member State UK

The menacing rhetoric of the present government, often uttered in the heat of the moment, may be indicative of a more serious problem within the still-Member State UK. In the last few days, members of [her Majesty's government and their advisors have openly hinted at the use of rioting and violence](#) should the country not withdraw

from the EU on 31 October. This may indicate a reluctance to accept the results of the democratic process in the country, such as the Benn Act. The rhetoric of a Prime Minister referring to an act of parliament as a surrender act may further support the assumption that this Prime Minister is unwilling to accept decisions by parliament. If strategies as outlined above, aimed to avoid compliance with an act of parliament, will actually be implemented, the problem would become even more serious. If the Prime Minister were not to comply with elements of the recent Supreme Court ruling, even the rule of law in the UK might be in danger.

If democracy or the rule of law are no longer adhered to in a Member State, there may be a breach of the EU's values enshrined in Article 2 TEU. Under [Article 7 TEU](#), the Council may determine a risk of a serious breach of the EU's values (paragraph 1), and with more stages to be completed, even find a serious breach (paragraph 2). This can then lead to a suspension of membership rights. Paragraphs 3-5). The threshold for applying this provision is very high: Already for establishing the risk of a breach under paragraph one, the Council cannot act on its own initiative. A reasoned proposal by one third of the Member States, the European Parliament or the EU Commission is required, and the Council needs to decide with four fifth of its members and the consent of the European Parliament. In order to establish a serious breach, unanimity of all Council members (excepting the Member State in question) is needed. The provision, also termed the "nuclear option", is criticised for being designed in a way that prevents its use. However, this was also thought to be the case with Article 50 TEU, which is presently used. The Commission has further developed a complementing "[rule of law framework](#)", providing mechanisms for low level intervention. A [proposal for a regulation](#) aiming to limit access to the EU's structural funds to rule of law violations has not passed all the stages of the parliamentary process before the EP elections in May 2019.

Notwithstanding [widespread critique](#), the existence of this framework demonstrates that the EU is not fully unprepared to deal with a rogue government in one of its Member States. Accordingly, [Members of the European Parliament have already proposed](#) to explore whether the situation in the United Kingdom has developed in such ways that a rule of law investigation is necessary. This proposal was triggered by the long prorogation of parliament. The [Supreme Court's ruling of 24 September](#) has demonstrated, that there was no need of external control, since the UK's judiciary has reined in the government. However, should the political dynamics result in more sustained threats of violence as a means of politics, the EU would not be without means to rein in its still-member UK. Such an event would offer a further opportunity to test the strength and functionality of the rule-of-law framework.

